Naza Motor Trading Sdn Bhd v Malaysian Motor Insurance Pool (formerly known as HRMIP) (administered by Malaysian National Reinsurance Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1013 OF 2006
LOW HOP BING, MOHAMED APANDI AND SYED AHMAD HELMY JJCA
4 OCTOBER 2010

Insurance — Motor insurance — Claims — Policy cover against theft — Motorcar theft while being test driven by potential buyer — Whether claim on grounds of theft or cheating — Whether intention and purpose of insurance policy to provide coverage for loss of vehicle during test driving by potential customers — Whether sales person took reasonable precautions to prevent such theft

The appellant/plaintiff was a car dealer and had procured from the respondent/defendant a policy of insurance, known as motor trade policy providing cover for, inter alia, loss of vehicle by theft. During the currency of the said policy a vehicle was stolen, while it was test driven by a potential buyer. The only issue for determination was whether the events leading to the loss of the vehicle constituted theft or cheating. The defendant had repudiated liability under the said policy on the grounds that the said motorcar was stolen by way of cheating under general exception No 8 of the said policy.

Held, allowing the appeal with costs:

(1) The term 'theft' in cl 1 of section 1 of the policy does not expressly stipulate any definition, whereas the term 'cheating' in exclusion cl 8 expressly stipulates that the term is as defined under the Penal Code. In the case of *Taisho Marine and Fire Insurance (M) Sdn Bhd (sekarang dikenali sebagai Taisho Marine and Fire Insurance (Malaysia) Bhd) v Secure Guards Sdn Bhd* [2001] 1 AMR 657, the term 'theft' was used and although not defined in the policy, it was held that such term was to be construed as defined in the Penal Code (see paras 10–11).

(2) Pursuant to Illustration (b) of s 378 of the Penal Code and upon taking into account Explanation 5, it was clear that the purported potential purchaser of the vehicle did take out of the possession of the vehicle which was then in the possession of the plaintiff's salesman and it was done dishonestly and without the consent of the salesman. Such loss of the motorcar was therefore a result of a theft (see para 16).

(3) Based on the facts, it was clear that the intention and purpose of the insurance policy was to provide coverage for loss of vehicle during test driving by potential customers. There is no conceivable situation where the salesman is to take all reasonable precautions to prevent such a theft, in such circumstances that took place as in this case. Even then any such reasonable precaution should not be repugnant to the commercial purpose of the contract between the plaintiff and the defendant. In such circumstances, under the insurance policy, the defendant could not deny liability and was therefore liable to the insured plaintiff (see paras 20 & 24).

[Bahasa Malaysia summary

Perayu/plaintif merupakan peniaga kereta dan telah memperolehi polisi insurans daripada responden/defendan, yang dikenali sebagai polisi perniagaan kereta yang memberikan perlindungan kepada, antara lain, kehilangan kereta disebabkan kecurian. Semasa polisi tersebut berkuat kuasa, sebuah kereta telah dicuri semasa ia dipandu uji oleh pembeli yang berpotensi. Satu-satunya isu untuk ditentukan adalah sama ada kejadian-kejadian yang membawa kepada kehilangan kereta tersebut membentuk kecurian atau penipuan. Defendan telah mengingkari liabiliti di bawah polisi tersebut atas dasar bahawa kereta tersebut telah dicuri melalui penipuan di bawah pengecualian am No 8 polisi tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Istilah 'theft' dalam klausa 1 seksyen 1 polisi tidak memperuntukkan dengan nyata sebarang definisi, manakala istilah 'cheating' dalam pengecualian klausa 8 memperuntukkan dengan nyata bahawa istilah tersebut adalah seperti yang didefinisikan di bawah Kanun Keseksaan. Di dalam kes *Taisho Marine and Fire Insurance (M) Sdn Bhd (sekarang dikenali sebagai Taisho Marine and Fire Insurance (Malaysia) Bhd) v Secure Guards Sdn Bhd* [2001] 1 AMR 657, istilah 'theft' telah digunakan dan meskipun ianya tidak didefinisikan di dalam polisi, telah diputuskan bahawa istilah tersebut hendaklah ditafsirkan seperti yang didefinisikan di dalam Kanun Keseksaan (lihat perenggan 10–11).

(2) Menurut Illustrasi (b) s 378 Kanun Keseksaan dan dengan mengambilkira Penjelasan 5, adalah jelas bahawa pembeli berpotensi yang dimaksudkan bagi kereta tersebut telah membawa keluar milikan bagi kereta tersebut yang mana pada masa itu dalam milikan jurujual plaintif dan ianya telah dilakukan secara tidak jujur dan tanpa kebenaran jurujual. Kehilangan kereta tersebut oleh itu adalah disebabkan kecurian (lihat perenggan 16).

(3) Berdasarkan fakta-fakta tersebut, adalah jelas bahawa niat dan tujuan polisi insurans tersebut adalah untuk memberi perlindungan bagi kereta

yang hilang semasa dipandu uji oleh pelangan-pelangan yang berpotensi. Tidak terdapat keadaan yang boleh difikirkan di mana jurujual harus mengambil segala langkah berjaga-jaga yang berpatutan untuk menghindar kecurian tersebut, seperti keadaan-keadaan yang berlaku di dalam kes ini. Jikapun begitu, sebarang langkah berjaga-jaga yang berpatutan tidak patut bertentangan dengan tujuan komersial kontrak di antara plaintif dan defendan. Dalam keadaan-keadaan tersebut, di bawah polisi insurans itu, defendan tidak boleh menafikan liabiliti dan justeru, bertanggungjawab terhadap plaintif yang diinsuranskan (lihat perenggan 20 & 24).]

Notes

For cases on claims for motor insurance, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 245–246).

Cases referred to

Devco Holder Limited and Burrows & Payne Limited v Legal and General Assurance Society [1993] 2 Lloyd's Rep 567 (refd)

Fraser v BN Furmans (Productions) Ltd, Miller, Smith & Partners (third party) [1967] 2 Lloyd's Rep 1 (refd)

Hong Leong Assurance Bhd v Teoh Seow Chiew [2004] 3 AMR 417, HC (refd)

Lake v Simmons [1927] AC 487, HL (refd)

Taisho Marine and Fire Insurance (M) Sdn Bhd (sekarang dikenali sebagai Taisho Marine and Fire Insurance (Malaysia) Bhd) v Secure Guards Sdn Bhd [2000] MLJU 688; [2001] 1 AMR 657, HC (refd)

Legislation referred to

Penal Code ss 378, Explanation 5, Illustration (b), 415, 417

Appeal from: Civil Suit No D6–22–137 of 2002 (High Court, Kuala Lumpur)

Sagadaven Thangavelu (K Navinderan with him) (Shearn Delamore & Co) for the appellant.

Nathan Maharajah (Ian Lawrence Pereira with him) (Lawrence Pereira & Partners) for the respondent.

Mohamed Apandi JCA:

INTRODUCTION

[1] This is an appeal against the decision of the Kuala Lumpur High Court in dismissing the plaintiff's claim for RM263,779.34 against the defendant under a policy of insurance.

[2] On 4 May 2010, after hearing submissions by both parties, we allowed the plaintiff's appeal. We now set out the grounds for our unanimous decision. **A**

FACTS OF THE CASE

[3] It is not in dispute that the appellant (plaintiff) is a car dealer and had procured from the respondent (defendant) a policy of insurance, known as motor trade policy providing cover for, inter alia, loss of vehicle by theft. **B**

[4] During the currency of the said policy a vehicle, a Mercedes Benz E230 bearing trade plate No W1180A and while it was test driven by a potential buyer, was stolen, presumably by the said potential buyer as he vanished with the car on the day it was test driven on 20 November 1998. The circumstances leading to the theft are as per the police report lodged by the salesman, Ariffin bin Majid ('SP1') at about one hour, after the incident. The police report was tendered and marked as exh P1. **C** **D**

[5] The plaintiff's claim for the loss of the motorcar under the said policy was rejected by the defendant, who repudiated liability solely on the exclusion cl B of the policy, namely the loss was due to cheating and not theft. **E**

STATEMENT OF AGREED FACTS

[6] Before we deal with the merits of the appeal, it is pertinent to reproduce in toto the statement of agreed facts (at pp 58–60 of the appeal records) that was agreed upon by both parties and therefore binding upon all parties. The agreed facts are as follows: **F**

STATEMENT OF AGREED FACTS

1. Pursuant to an application by way of a proposal form dated 11.8.1998 and in consideration of the premiums paid by the Plaintiff, the defendant had issued a policy of insurance known as Motor Trade Policy (Road Risk) to the Plaintiff for the period 23.8.1998 to 22.8.1999 (hereinafter referred to as 'the said Policy'). **G**
2. Pursuant to Section 1 of the said Policy, the Defendant had agreed to provide cover and to indemnify the Plaintiff in respect of loss or damage to the motor vehicles arising from, inter alia, by fire, external explosion, self-ignition or lightning or burglary house breaking or theft. **H**
3. On or about 20.11.1998 during the currency of the said Policy the Plaintiff's vehicle bearing Reg. No. W1180A model Mercedes Benz E230 (hereinafter referred to as 'the said motorcar') was stolen by a third party representing himself as one Dato' Ahmad Rosli Bachik (hereinafter referred as 'the said customer'). **I**
4. The said customer had visited the Plaintiff's showroom situated at No. 129, Jalan Raja Muda Abdul Aziz, Kg. Baru, 50300 Kuala Lumpur and has indicated his intention to purchase a new motorcar model Mercedes Benz. The said

customer was attended to by one Encik Ariffin bin Majid (hereafter referred to as the 'Plaintiff's Sales Representative').

5. The said customer had requested to test drive the said motorcar and was accompanied by the Plaintiff's Sales Representative during the test drive.

6. Whilst in course of test driving the said motorcar the said customer had received a telephone call via his mobile phone. Subsequently, he stopped the said motorcar along Batu 5, Jalan Gombak, Kuala Lumpur and requested the Plaintiff's Sales Representative to buy fried chicken from a Kentucky outlet.

7. The Plaintiff's Sales Representative went to buy the fried chicken and upon his return, he discovered that both the said customer and the said motorcar had disappeared.

8. At all material times, the said customer had misrepresented himself as Dato' Ahmad Rosli Bachik and that he had wanted to buy the said motorcar.

9. The Plaintiff's Sales Representative had lodged a police report on 20.11.1998.

10. The Plaintiff had intimated a claim under the said Policy for the sum of RM263,779.34.

11. The Defendant has repudiated liability under the said Policy on the grounds that the said motorcar was stolen by way of cheating under General Exception No. 8 of the said Policy.

Dated 4th day of December 2002.

THE ONLY ISSUE FOR DETERMINATION

[7] From the agreed facts as listed above and from subsequent statement of agreed issue, that was filed in the action, it can be concluded that the only issue for determination is whether the events leading to the loss of the Mercedes Benz constituted theft or cheating. If it is theft, the defendant will be liable, but if it is cheating, the defendant shall not be liable.

[8] The insurance policy in question was produced and marked as exh P3 (pp 260–273 of the appeal records). The relevant part in respect of coverage is as in cl 1 of section I — loss or damage, which reads as follows:

SECTION I — LOSS OR DAMAGE

1 The Pool will indemnify the Insured against loss of the damage to the Motor Vehicle and its accessories and spare parts whilst thereon —

(a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear;

(b) by fire external explosion self-ignition or lightning or burglary housebreaking or theft.

[9] The relevant part of the policy that was relied upon by the defendant is under cl 8 of the general exceptions, which reads as follows:

> 8. any loss or damage caused by or attributed to the act of cheating by any person within the meaning of the definition of the offence of cheating set out in the Penal Code. Cheating is defined in the Penal Code 'as whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do nor omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat';

APPLICATION OF FACTS TO THE POLICY AND THE LAW

[10] From the above citations of the relevant clauses of the policy that were relied on by the respective parties, it must be observed that the term 'theft' in cl 1 of section 1 does not expressly stipulate any definition, whereas the term 'cheating' in the exclusion cl 8 expressly stipulates that the term is as defined under the Penal Code.

[11] Bearing that in mind, we associate ourselves with the decision by KC Vohrah J (as he then was) in *Taisho Marine and Fire Insurance (M) Sdn Bhd (sekarang dikenali sebagai Taisho Marine and Fire Insurance (Malaysia) Bhd) v Secure Guards Sdn Bhd* [2000] MLJU 688; [2001] 1 AMR 657, where the term 'theft' is used and although not defined in the policy, it was held that such term is to be construed as defined in the Penal Code.

[12] Since the liability or repudiation of liability hinges upon the commission of criminal offences, namely either theft or cheating, it is reasonable to visualise the facts within the scope or definitions under the Penal Code.

[13] What is theft under the Penal Code? Section 378 defines theft as: 'Whoever, intending to the take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.'

[14] The above definition in the Penal Code is followed by a few Explanations and Illustrations. Explanation 5 reads as follows:

> The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

[15] Illustration (b) reads as follows:

> (b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

[16] In the context of Illustration (b) and upon taking into account Explanation 5, it is clear that the purported potential purchaser of the motorcar did take out of the possession of the said motorcar which was then in the possession of the plaintiff's salesman and it was done dishonestly and without the consent of the salesman. Such loss of the motorcar was therefore a result of a theft.

[17] On the other hand, cheating as defined under s 415 of the Penal Code, reads as follows:

> Cheating
>
> 415 Whoever by deceiving any person, whether or not such deception was the sole or main inducement —
>
> (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or
>
> (b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,
>
> is said to 'cheat'.

[18] As with the definition of theft under s 378, the definition of cheating under s 417 is followed by a few Explanations and Illustrations.

[19] Applying the facts of the case, we could not fit the facts of this case with any of the Explanations or Illustrations as envisaged by s 417 of the Penal Code. From the facts too, we find that even if there is any element of deceit by the thief, it was just to facilitate the theft. On this point, it is appropriate to quote what Lord Atkinson said in *Lake v Simmons* [1927] AC 487 (HL) at p 511, which reads as follows:

> I think Miss Esmé Ellison obtained the possession of the jewellery handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it, she feloniously appropriated it, is not disputed. But the operation of entrusting the possession of the jewellery but not the property in it to her, which, prima facie, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable

> from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation the woman made to the appellant, which he apparently believed, secondly, the action he took, acting on that belief, and third, the felonious appropriation of the goods when obtained by her to her own use. The socalled entrusting of the jewels to her, furnished to her — as she intended it should — the opportunity for and means of committing the theft.

[20] From the facts adduced, we also find that the intention and purpose of the insurance policy is to provide coverage for loss of vehicle during test driving by potential customers. There is no valid reason for the plaintiff's salesman to doubt or disbelief the intention of the potential customer to test drive and probably purchase the vehicle. There is no conceivable situation where the salesman is to take all reasonable precautions to prevent such a theft, in such circumstances that took place as in this case. Even then any such reasonable precaution should not be repugnant to the commercial purpose of the contract between the plaintiff and the defendant. On this point, it is suffice to quote Lord Diplock LJ in *Fraser v BN Furmans (Productions) Ltd, Miller, Smith & Partners (third party)* [1967] 2 Lloyd's Rep 1 at p 12, which reads:

> 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is inter alia to indemnify the insured against liability for his (the insured's) personal negligent.

[21] On a more local scene, Justice Raus Sharif (as he then was) in *Hong Leong Assurance Bhd v Teoh Seow Chiew* [2004] 3 AMR 417, where the issue also centres over whether the loss of vehicle was due to theft or cheating, His Lordship upheld the sessions' court decision of allowing the claim payable under the insurance policy. On the precaution to be undertaken by the plaintiff, the learned judge stated:

> With due respect, I am unable to agree with the defendant's contention. I am of the view the plaintiff's act of delivering his motorcar to a car wash operator at the Petronas Petrol Station at Tg Tokong, is not an act of failure to take reasonable precaution, against loss or damage to the motorcar. The plaintiff's act cannot be termed as reckless. There are no elements of the respondent deliberately courting a danger. Thus, I am unable to accept the defendant's contention that the plaintiff in this case has acted recklessly.

[22] In the course of giving his judgment, the learned judge distinguished the case with the facts in the case of *Devco Holder Limited and Burrows & Payne Limited v Legal and General Assurance Society* [1993] 2 Lloyd's Rep 567, where it was held that the insurers were not liable when the insured had acted recklessly by leaving his car unattended, with its engine running, at a car park.

Coincidentally, the defendant (the respondent) in this appeal had relied on the said *Devco Holder*'s case to show recklessness on the part of the plaintiff/appellant.

CONCLUSION

[23] From the facts of the case as revealed in the appeal records, we find that there is not a single element to show that the plaintiff's salesman was deliberately courting danger. He also cannot be said to have thrown caution to the winds. In the circumstances leading to the situation where the potential buyer of the test car had driven off with the car, was beyond any reasonable expectations. The poor salesman was deceived into leaving the car with a view to oblige the potential buyer. No reasonable man would have foreseen that such a potential buyer, who had portrayed himself as a man of some standing in society, would have acted in such a manner. The deceit by the potential buyer is indicative of his dishonest intention to take the car out of the possession of the salesman, without the latter's consent. This situation is similar, by analogy, to Illustration (b) of s 378 of the Penal Code. To our minds, what transpired on that fateful date of 23 November 1998 was a theft per se of the Mercedes Benz, by the potential buyer.

[24] In such circumstances, under the insurance policy, the defendant cannot deny liability and therefore correspondingly they are liable to the insured plaintiff.

[25] In that light, we unanimously allowed the appeal with costs.

Appeal allowed with costs.

Reported by Mashrifah Ravendran